80-1004

No. _____

Supreme Court, U.S.
FILED
DEC 19 1980
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1980

J. LEE HAVENS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM C. LEE
Attorney for Petitioner
803 South Calhoun Street
900 Inland Building
Fort Wayne, Indiana 46802

No. _____

In The Supreme Court of the United States
OCTOBER TERM, 1980

No. _____

J. LEE HAVENS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM C. LEE
Attorney for Petitioner
803 South Calhoun Street
900 Inland Building
Fort Wayne, Indiana 46802

The petitioner, J. LEE HAVENS, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in these procceedings on September 17, 1980

QUESTION PRESENTED FOR REVIEW

Whether a federal trial judge, in a criminal jury trial, committed reversible error in violation of defendant's right to counsel under the Sixth Amendment to the United States Constitution by the following acts:

> During cross-examination of defendant, the judge excused the jury in order to confer with counsel and a prosecution witness. At that time the judge also ordered the defendant to leave the courtroom. At the conclusion of the conference, the judge refused defense counsel's request to go to his client, who was still absent from the courtroom, and the judge further ordered defense counsel not to speak with defendant prior to his resuming the stand.

TABLE OF CONTENTS

	Page
Question presented for review	2
Table of authorities	4
Opinion below	5
Jurisdiction	5
Constitutional provision involved	5
Statement of the Case	5
A. Prior proceedings	5
B. Facts	7
Argument	10
Appendix	13
A. Decision of the United States Court of Appeals for the Fifth Circuit	13
B. Order of Court of Appeals denying rehearing	13
C. Excerpt from brief before Court of Appeals	14

TABLE OF AUTHORITIES

Sixth Amendment to United States Constitution
28 U.S.C. 1254 (1)
21 U.S.C. 841 (a)(1)
21 U.S.C. 952 (a)
21 U.S.C. 960 (a)(1)
21 U.S.C. 963
Geders v. *United States*
425 U.S. 80, 96 S.Ct. 1330 (1976)
Glasser v. *United States*
315 U.S. 60, 62 S.Ct. 457 (1942)
United States v. *Allen*
542 F.2d 630 (1976)
United States v. *Bryant*
545 F.2d 1035 (1976)

OPINION BELOW

The judgment of the Court of Appeals for the Fifth Circuit, without opinion, is not yet reported, and it is shown at Appendix A.

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on September 17, 1980. A timely petition for rehearing was denied on October 24, 1980 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. **Prior Proceedings.** On February 10, 1978 petitioner was convicted, in the United States District Court for the Southern District of Florida, of possessing cocaine with intent to distribute it, and of importing and conspiring to import cocaine, in violation of 21 U.S.C. 841 (a)(1), 952 (a), 960 (a)(1) and 963.

On April 5, 1979 the Court of Appeals for the Fifth Circuit reversed the conviction of petitioner and ordered a new trial. The opinion of the Court is reported at 592 F. 2d 848. The decision was based solely upon an evidentiary question involving the Fourth Amendment to the United States Constitution. Other issues, properly raised by petitioner on appeal, were deemed moot by the Court of Appeals in view of its reversal of conviction on the Fourth Amendment issue. The Court said, "we do not treat his other contentions because they involve rulings on matters that are not likely to recur upon retrial of his case." 592 F. 2d at page 849. Among the "other contentions" found to be moot is the issue herein presented to this Court: the denial of assistance of counsel in violation of the Sixth Amendment to the United States Constitution. It should be noted that the issue presented herein was fully briefed at pages 37-40 in petitioner's original brief in the Court of Appeals. A summary of that argument, shown at page 37 of petitioner's original brief, is shown at Appendix C. Thereafter, the government appealed the reversal of petitioner's conviction, and the Supreme Court ruled against petitioner on May 27, 1980, reinstating the original conviction. *United States* v. *Havens*, — U.S. —, 64 L.Ed. 2d 559, 100 S.Ct. —.

The decision of the Supreme Court was based solely upon the Fourth Amendment issue, and, as petitioner had requested in the event of an adverse ruling upon that point, the case was remanded to the Court of Appeals for "further proceedings consistent with this opinion."

Upon a review of the other issues (formerly held to be moot) raised by petitioner in his original appeal, which issues include the Sixth Amendment issue presented herein, the Court of Appeals entered judgment against petitioner, affirming his original conviction, on September 17, 1980 (Appendix A). The judgment is not yet reported.

B. **Facts.** In the midst of cross examination of petitioner at trial, the district court judge excused the jury and ordered the petitioner from the courtroom (Tr. 384-385). Thereafter an extended discussion ensued involving the prosecutor, judge, defense counsel, and a DEA agent who was a witness for the government. (Tr. 385-398). At issue was the availability to the government of certain evidence (T-shirts) which had been illegally seized from petitioner. In the prior proceedings discussed above, the Supreme Court held that the evidence in question could be used for impeachment purposes if the cross examination could have been reasonably suggested by questions posed on direct examination. *United States* v. *Havens, supra.*

The trial court, however, erroneously believed that the issue of admissibility turned on whether or not petitioner denied possessing the suppressed evidence. (Tr. 397-398). The following exchange illustrates the misconception of the court:

> THE COURT: Now, he has not been asked on the stand whether or not he was carrying a tee shirt which had been cut up, or portions cut out of it, which could have been used in the other tee shirt.
>
> He has not been asked that, but I presume you intend to ask that question.
>
> MR. CULVERHOUSE: That was the question I was getting into.
>
> THE COURT: And if he denied that, then you would intend to offer this, not for the proof of his guilt, but for proof of his —
>
> MR. McCAIN: What?
>
> MR. CULVERHOUSE: It would be for impeachment purposes through Agent Martinez. (Tr. 398)

At pages 399-400 of the trial transcript appears:

> MR. McCAIN: Well, he wouldn't — if he were asked the question, Judge,

"Was there a tee shirt found, Size 38-40 in your suitcase?"

he is not going to lie under oath. He is going to say:

"Yes, there was."

THE COURT: Fine. Then, that takes care of it.

MR. McCAIN: He is not going to lie under oath. I can guarantee that. Not with me representing him, he won't.

THE COURT: Well, we will soon find out, because I guess he will be asked.

MR. McCAIN: I will guarantee that he will say, he will, if he is asked that question, and he is under oath, and he is required to answer that question because of a ruling by the Court, then he will answer:

"Yes, there was a Size 38-40 tee shirt found in the luggage,"

in his luggage.

THE COURT: Portions of which had been cut out. Patches or portions, the tail of it had been cut up and out.

MR. McCAIN: Then, as I understand it, from your ruling, then at that point they can put the tee shirt in evidence against us.

THE COURT: Not if he answers truthfully.

MR. CULVERHOUSE: If he says, "yes"—that's what I was getting at earlier—if he says:

"Yes, the tee shirt was found," my next question, I would proffer, would be:

"Did you tell Agent Martinez on the 3rd of October that that tee shirt belonged to Mr. McLeroth?"

If he says, "Yes"—

MR. McCAIN: He will say, "Yes."

MR. CULVERHOUSE: I cannot go any further.

THE COURT: Yes. That's all we are talking about.

Petitioner Havens ultimately testified that he had not

known that the suppressed evidence had been in his luggage until the day following his arrest (Tr. 405-407).

At the conclusion of the conference, the trial record shows the following exchange between defense counsel and the trial judge:

> "MR. McCAIN: May I now have an opportunity to advise my client?
>
> THE COURT: No, sir. You may not. You may not at all. The whole purpose of this is not for you to go out and coach your client as to what to say.
>
> MR. McCAIN: I am not going to tell him what to say.
>
> THE COURT: Well, that's what you just asked me permission to do. That's why I asked him to step out, so he would not hear this discussion.
>
> The whole purpose is searching for the truth. I assume he is going to tell the truth when he comes back in. If he does that, that's the end of it.
>
> If he does not, why — all right, bring the jury in.
>
> Get the jury and then we will ask the witness to come in.
>
> Give him the tee shirt back. It is marked for Identification. You may leave that in here. Keep it right in here in your briefcase.
>
> MR. McCAIN: May I get my client?
>
> THE COURT: Would you wait just a minute? The Marshall will get him in just a second.
>
> Pat, would you go out and ask Mr. Havens to step in, please, and take a seat in the witness box.
>
> There will be no conversation with the witness." (Tr.R. 401-403)

The above reflects the apparent fear of the judge that defense counsel might urge his client *to tell the truth*, thus possibly spoiling the proposed use of supposed "impeachment evidence".

ARGUMENT

This Court has spoken clearly on the subject of forbidding communication between a defendant and his lawyer during trial.

In *Geders* v. *United States*, 425 U.S. 80, 96 S.Ct. 1330 (1976), the trial court had forbidden communication between the defendant and his lawyer during an overnight recess. The Court of Appeals for the Fifth Circuit had then held that the defendant's failure to claim any prejudice resulting from his inability to consult with counsel during the recess was fatal to his appeal.

On *certiorari*, the Supreme Court reversed and remanded. In an opinion by Justice Burger, C.J., expressing the unanimous view of the eight participating members of the Court, it was held that any conflict between the defendant's right to consult with his attorney during the overnight recess, and the prosecutor's desire to cross examine the defendant without the intervention of defendant's counsel, and the risk of improper "coaching" must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.

In a separate opinion by Justice Marshall, concurred in by Justice Brennan, the following was stated:

> "The Court holds that the fear of unethical conduct is not a sufficient ground for an order barring overnight communication between a defendant and his attorney, and the same would hold true, I take it, for an order barring consultation between a defendant and his attorney at *any* time before or during the trial. If our adversary system is to function according to design, we must assume that an attorney will observe his responsibility to the legal system, as well as to his client. I find it difficult to conceive of any circumstances that would justify a court's

> limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards."

Citing the *Geders* case, the Court of Appeals for the Sixth Circuit dealt with a prohibition of communication between defendant and his lawyer during a one hour recess as follows:

> "In the absence of extraordinary circumstances which do not appear in the record, it is an abuse of discretion and a violation of the right of a defendant to assistance of counsel for a trial court to direct that a defendant have no communication with his counsel during a criminal trial."

United States v. *Bryant*, 545 F.2d 1035 (1976)

See also *United States* v. *Allen*, 542 F.2d 630 (1976) where the Court, referring to recesses of 20 minutes and of "but a minute" said:

> "We agree and hold that a restriction on defendant's right to counsel with his attorney during a brief routine recess is constitutionally impermissible."

In *Glasser* v. *United States*, 315 U.S. at 76, the Court said,

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The Government, by its brief in the Court of Appeals, at page 22, apparently contends that the trial court can prohibit any communication between counsel and defendant, provided that a recess has not been taken. It should be borne in mind that the petitioner, at the time of the prohibition complained of, was not on the witness stand. He was not even in the courtroom!

Curiously, the Government also cited the *Geders* case to support the trial court's ruling, stating that the Court in *Geders* suggested that the trial court may direct that

the examination of the witness continue uninterrupted until completed. In the instant case, as noted above, the interruption had occurred, and the defendant was not even present in the room.

The suggestion may be made that the powerful mandate of the Sixth Amendment to the United States Constitution, as well as the unanimous decision of this Court in *Geders*, may somehow be disregarded if the truth seeking process is advanced by the trial court's action. This suggestion is clearly not in the spirit of Geders, which held the constitutional right so essential and basic that no prejudice need be shown when the denial, as in the present case, had been clearly established.

Moreover, in this case, the truth seeking process suffers a bizarre distortion, when most certainly the trial court's only fear was that the petitioner might be urged to tell what the judge perceived to be the truth.

The petitioner was not physically on the stand (or even in the courtroom) and he could not have been interrogated until the jury reconvened and he resumed the stand. Under these circumstances it is submitted that a violation of his rights under the Sixth Amendment to the United States Constitution is impermissible.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

WILLIAM C. LEE
Attorney for petitioner
803 South Calhoun Street
900 Inland Building
Fort Wayne, Indiana 46802
Telephone 219-423-1311

December, 1980

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

J. Lee HAVENS, Defendant-Appellant.

No. 78-5411

United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1980.

Appeal from the United States District Court for the Southern District of Florida; James Lawrence King, Judge.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before WISDOM, GOLDBERG, and VANCE, Circuit Judges.

PER CURIAM:

Pursuant to the judgment of the Supreme Court, — U.S. —, 100 S.Ct. 1912, 64 L.Ed.2d 599, of the United States reversing the decision of this court, 592 F.2d 848, and remanding this case for further proceedings, the judgment of conviction as entered by the United States District Court for the Southern District of Florida is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5411

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
J. LEE HAVENS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING

(October 24, 1980)

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/Robert A. Vance
United States Circuit Judge

APPENDIX C

(Excerpt from page 37 of petitioner's criginal brief and argument filed with the United States Court of Appeals for the Fifth Circuit, on appeal from a judgment entered in the United States District Court for the Southern District of Florida.)

> 3. The court violated appellant's right to counsel under the Sixth Amendment to the United States Constitution when it banished appellant from the courtroom during trial and refused to permit defense counsel to speak with or go to him.